No. 01-25

In the Supreme Court of the United States

ALFRED W. TRENKLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's appeal as untimely, where petitioner failed to follow the clear language of Federal Rule of Appellate Procedure 4(b) governing the timing for filing notices of appeal and instead allegedly relied on incorrect advice from district court employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) dismissing petitioner's appeal for lack of jurisdiction is unreported. The opinion of the district court (Pet. App. A5-A7) denying petitioner's motion for a new trial as untimely is also unreported.

JURISDICTION

The judgment of the court of appeals was entered April 6, 2001. The petition for a writ of certiorari was filed July 5, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted of receipt of explosives with knowledge that they would be used against persons and

property, in violation of 18 U.S.C. 844(d); malicious destruction of property by means of explosives, in violation of 18 U.S.C. 844(i); and conspiracy, in violation of 18 U.S.C. 371. He was sentenced to life imprisonment and the court of appeals affirmed. 61 F.3d 45 (1995). Petitioner subsequently filed two motions for a new trial and a motion to vacate his conviction under 28 U.S.C. 2255 (1994 & Supp. V 1999). Pet. App. A6. The district court denied all three motions, the court of appeals affirmed the denial of both new trial motions, and petitioner's appeal of the denial of his Section 2255 motion is still pending. *Ibid.*

1. Petitioner built a bomb intended for use against a friend's father. The bomb was placed in the intended victim's driveway, and it exploded on October 28, 1991, while Boston police officers were inspecting it. The blast killed one officer and seriously injured another. 61 F.3d at 47-48.

Following a massive investigation, petitioner and the intended victim's son were arrested. Petitioner was tried before a jury in the United States District Court for the District of Massachusetts. He was convicted on November 29, 1993, and the district court entered judgment against him on March 8, 1994. Pet. App. A5.

2. More than six years after the jury returned its verdict, petitioner filed a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33, asserting that he had newly discovered evidence. Pet. App. A8-A12. As we have noted, the motion was preceded by several other unsuccessful attempts by petitioner to overturn his conviction. Petitioner now claims to have discovered evidence revealing that the government introduced a fabricated document at trial; that his co-defendant would testify at a hearing that petitioner did not commit the offenses for which he was

convicted; and that another witness would testify about the lack of veracity of a trial witness who testified against petitioner. *Id.* at A10-A11.

The district court denied the motion on December 28, 2000. Pet. App. A5-A7. As to the merits, the district court found that the "newly discovered" evidence had been available at the time of the trial and that the purported exculpatory witness statements were not supported by affidavits. *Id.* at A6-A7. Ultimately, however, the court denied petitioner's motion as untimely, concluding that

> In the end, * * * the motion fails because it is simply too late. * * * Whichever version of the Rule governs [current Rule 33 as amended in 1999 or former Rule 33], the motion, filed in August 2000, is untimely as it was filed more than three years after the verdict, November 1993, and more than two years after the date of the mandate from the Court of Appeals, July 1995.

Id. at A7.

On January 5, 2001, petitioner sought a 30-day extension of time to file his notice of appeal from the district court's denial of his Rule 33 motion. That request, supported by an affidavit from a partner of petitioner's lawyer, stated that petitioner's counsel had become disabled and that petitioner needed additional time to determine whether to have the same law firm continue its representation or whether to obtain new counsel. Pet. App. A14-A15. The district court granted the motion on January 22, 2001. *Id.* at A15.

According to an affidavit of Jack Wallace, petitioner's stepfather, two of the district court's employees advised him concerning the new filing date. In particular, Wallace claims that on January 29, 2001, a courtroom

supervisor told him that the notice of appeal had to be filed within 30 days from the date on which the district court's order granting the extension was docketed, which had not yet occurred. Pet. App. A24. Wallace also alleges that on February 2, 2001, the district judge's deputy clerk told him that the "motion" had been docketed on February 1, and that "the 30-day extension of time would begin running on that day." *Id.* at A24-A25. Petitioner filed a notice of appeal on February 20, 2001—54 days after the entry of the order from which he was appealing. *Id.* at A16.

3. On March 14, 2001, the court of appeals advised petitioner that his appeal might be dismissed due to lack of appellate jurisdiction. The court's order acknowledged that the district court had granted petitioner's motion to extend the filing deadline, but observed that, under Federal Rule of Appellate Procedure 4(b)(4), such an order extended the filing deadline only to 30 days beyond the expiration of the original ten-day period. The court of appeals ordered petitioner either to move for voluntary dismissal or to show cause why the appeal should not be dismissed. Pet. App. A3-A4.

Petitioner responded by asking the court to accept the untimely notice of appeal under the doctrine of "unique circumstances." Pet. App. A17-A21. The court of appeals declined to do so, following *United States* v. *Heller*, 957 F.2d 26, 31 (1st Cir. 1992), which held that "reliance on the advice, statements, or actions of court employees cannot trigger the [unique circumstances] doctrine whether appellant is or is not pro se." Pet. App. A1-A2 (quoting *Heller*, 957 F.2d at 31). The court therefore dismissed petitioner's appeal for lack of jurisdiction. *Id.* at A2.

ARGUMENT

Petitioner contends (Pet. 7-10) that this Court should grant certiorari to resolve a conflict between the circuits as to whether the "unique circumstances" doctrine, which in some circumstances has been applied to excuse a failure to file a timely notice of appeal, may be triggered by erroneous advice from a district court's employees. This case, however, does not implicate the purported division of circuit authority that petitioner identifies, as there is no reason to believe that it would have been resolved differently had it arisen in another circuit. In any event, petitioner would not prevail on his appeal because his motion for a new trial—filed more than six years after the verdict—was itself untimely and thus correctly denied.

1. Federal Rule of Appellate Procedure 4(b)(1)(A)(i) states that notices of appeal in criminal cases must be filed within ten days after the entry of the order being appealed. Upon a finding of good cause or excusable neglect, a district court may extend this time "for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)." Fed. R. App. P. 4(b)(4). In light of the district court's order granting petitioner's request for a 30-day extension, petitioner's notice of appeal was due no later than February 6, 2001, *i.e.*, 40 days after the district court's December 28, 2000 order denying his new trial motion. Petitioner, however, did not file a notice until February 20, 2001.

To salvage his untimely appeal, petitioner invokes the judicially created "unique circumstances" doctrine, which originated in *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam). In *Harris*, the district court—acting before the initial time

for filing an appeal had run—granted the losing party an extension pursuant to Federal Rule of Civil Procedure 73(a) (now Federal Rule of Appellate Procedure 4(a)). The court of appeals dismissed the appeal, finding that the circumstances upon which the district court had relied to grant the extension did not constitute "excusable neglect." 371 U.S. at 216. This Court reversed, pointing to the great hardship to a party who, before the expiration of the period for taking an appeal, relies on a district court's finding of excusable neglect only to have that finding reversed later. The Court concluded that these facts constituted such "unique circumstances" that the court of appeals should not have disturbed the district court's decision to grant the extension. *Id.* at 217.

The Court extended the "unique circumstances" doctrine in *Thompson* v. *INS*, 375 U.S. 384 (1964) (per curiam). There, the district court erroneously told Thompson that his new trial motion had been made "in ample time," when it had in fact been filed two days late. After the motion was denied, Thompson—in reliance on the misinformation given him by the court—miscalculated the time for filing a notice of appeal of the underlying order. *Id.* at 385. The Seventh Circuit dismissed the appeal as untimely, *ibid.*, but this Court reversed, finding that "unique circumstances" placed the case "squarely within the letter and spirit of *Harris*." *Id.* at 387. The Court reasoned that Thompson had done an act (filing a new trial motion) which, if properly done, would postpone the deadline for filing a notice of appeal, and had relied on the district court's conclusion that the act had been properly done. *Ibid.* That same Term, the Court relied on *Thompson* in summarily reversing another court of appeals' dismissal

of an appeal. *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964) (per curiam).

More recent decisions by this Court, however, have stressed the limited nature of the "unique circumstances" doctrine, and have confirmed that "the requirement of a timely notice of appeal is 'mandatory and jurisdictional.'" *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (per curiam) (quoting *Browder* v. *Director, Dep't of Corr.*, 434 U.S. 257, 264 (1978)). As the Court observed in *United States* v. *Locke*, 471 U.S. 84, 101 (1985): "Filing deadlines, like statutes of limitations, necessarily operate harshly and arbitrarily with respect to individuals who fall just on the other side of them, but if the concept of a filing deadline is to have any content, the deadline must be enforced." The Court has correspondingly emphasized that the "unique circumstances" doctrine "applies *only* where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a *judicial officer* that this act has been properly done." *Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989) (emphasis added).

Accordingly, because petitioner's stepfather allegedly relied on erroneous statements made to him only by court employees, the court of appeals correctly concluded that any reliance would not be protected under that doctrine. Pet. App. A1-A2. Similar conclusions have been reached by most courts of appeals that have addressed this issue. See *Rezzonico* v. *H & R Block, Inc.*, 182 F.3d 144 (2d Cir. 1999), cert. denied, 528 U.S. 1189 (2000); *In re the Suspension of Pipkins*, 154 F.3d 1009 (9th Cir. 1998); *Moore* v. *South Carolina Labor Bd.*, 100 F.3d 162 (D.C. Cir. 1996); *Sonicraft, Inc.* v. *NLRB*, 814 F.2d 385 (7th Cir. 1987).

Petitioner argues that the unpublished decision in this case, and those of the Second, Seventh, Ninth, and D.C. Circuits, conflict with the Eleventh Circuit's more "liberal reading" (Pet. 8) of the "unique circumstances" doctrine. This case does not properly present that purported conflict, however, because there is no reason to believe that petitioner would have prevailed in *any* circuit. Petitioner does not merely seek to have the "unique circumstances" doctrine extended to permit reliance on statements by court employees; he also asks that litigants be permitted to rely even where such reliance is unreasonable because the statements are contrary to the clear text of the Federal Rules. Here, the Rules are clear that a notice of appeal in a criminal case must ordinarily be filed within ten days of the order being appealed, see Fed. R. App. P. 4(b)(1)(A)(i), and that a district court cannot extend this period beyond "30 days from the expiration of the time otherwise prescribed by this Rule," Fed. R. App. P. 4(b)(4). None of the cases on which petitioner relies suggest that the "unique circumstances" doctrine would excuse compliance with a jurisdictional deadline in such circumstances.

Two of the cases cited by petitioner presented the question whether litigants are entitled to rely upon the factual accuracy of the district court's records in determining when a notice of appeal would be due through otherwise proper application of the governing provisions of the Federal Rules of Appellate Procedure. In *Hollins* v. *Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999), the district court had entered an order against the appellant, but counsel for the appellant never received a copy of the order and the judicially maintained PACER system failed to reflect that it had been entered. The lawyer eventually learned of the

order and promptly filed a notice of appeal. *Id.* at 1325-1326. The Eleventh Circuit held that counsel was entitled to rely on the accuracy of the PACER system, and thus declined to dismiss the appeal as untimely. *Id.* at 1327. Similarly, in *Prudential-Bache Sec., Inc.* v. *Fitch*, 966 F.2d 981 (5th Cir. 1992), the appellant received a copy of the district court's order that was stamped as having been "ENTERED" 11 days before the order was actually entered on the court's docket. Relying on that date, the appellant filed a premature notice of appeal. *Id.* at 983-985. The Fifth Circuit declined to dismiss the appeal, holding that the appellant had been entitled to rely on the date stamp. *Id.* at 985-986.

Petitioner's reliance on *Swartz* v. *Pridy*, 94 F.3d 453 (8th Cir. 1996), is likewise misplaced. In that case, the district court clerk improperly refused to accept an appellant's timely notice of appeal. After the district court had entered a non-final order, the appellant had submitted a premature notice of appeal, which the clerk accepted. The court later entered a final order, and the appellant filed another notice of appeal. The clerk's office declined to accept the timely notice, stating that it had already received the appellant's earlier notice of appeal. *Id.* at 455. Faced with those facts (involving no default by the appellant), the Eighth Circuit refused to dismiss the appeal for lack of appellate jurisdiction. *Id.* at 456.[1]

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[1] Nor would petitioner prevail under the holding of *Willis* v. *Newsome*, 747 F.2d 605 (11th Cir. 1984) (per curiam)—a decision that preceded this Court's more recent jurisprudence on the subject. There, counsel for the appellant mailed rather than hand-delivered the notice of appeal in reliance on a statement by the district court clerk that "local custom" was to date such notices as having been filed on the date that they were mailed. The court of

Petitioner has cited no case in which any court has applied the "unique circumstances" doctrine to excuse an untimely notice of appeal where, as here, judicial employees allegedly misled a litigant as to the clear language of a Federal Rule. Petitioner needed only to consult Federal Rule of Appellate Procedure 4(b)(4) to learn that the district court's order extending his time to appeal ran from "the expiration of the time otherwise prescribed by this Rule 4(b)," *i.e.*, the ten days allowed for an appeal of an order in a criminal case. See Fed. R. App. P. 4(b)(1)(A)(i). Petitioner has pointed to no case applying the "unique circumstances" doctrine in such a situation.

2. Even apart from the untimeliness of petitioner's notice of appeal, petitioner was manifestly not entitled to relief from the court of appeals because his attempted appeal was frivolous. Petitioner filed the present new trial motion more than six years after judgment was entered against him. As the district court correctly ruled, that motion was filed more than three years too late, regardless of whether the current

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appeals remanded the case, directing the district court to determine whether the lawyer had actually relied on the clerk's statement. See *id.* at 606. *Willis* presented a significantly different situation from the one here. As this Court has recognized, the language of the version of Federal Rule of Appellate Procedure 4(a) in effect at the time of *Willis* did not establish what constituted "filing" a notice of appeal. *Houston* v. *Lack*, 487 U.S. 266, 273 (1988); *id.* at 277 (Scalia, J., dissenting). Here, in contrast, the answer to petitioner's question was clear on the face of the Rule itself—the district court's order extended the time for appeal for 30 days beyond the ten-day period otherwise prescribed for criminal appeals. See Fed. R. App. P. 4(b)(4). In such a situation, it is not at all clear that the Eleventh Circuit would hold that petitioner was justified in relying on the faulty advice allegedly received by his stepfather from the court's employees.

or pre-1999 version of Federal Rule of Criminal Procedure 33 applies here. Pet. App. A7. Because affirmance of the judgment of the district court would have been required on that ground even had the appeal been timely, review by this Court of the "unique circumstances" issue is particularly unwarranted in this case.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] The district court's cogent observations about the motion's lack of merit (in addition to its untimeliness) further emphasize the futile nature of petitioner's attempted appeal. See Pet. App. A6-A7.